JAMES P. BRENNAN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 39

[redacted]

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 22

PETER CHAUNT, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

We see no need, in the light of the government's brief, to add to our discussion of the two questions presented by petitioner. This reply will be addressed to the government's Point II, that "The Judgment of Denaturalization Is Independently Sustained By Petitioner's Fraudulent Concealment of His Communist Party Membership" (Br. 41).

This point was not reached by the Court of Appeals, and was therefore not argued in our principal brief.

The government submits (Br. 41-43) that the point involves no problems of fact and should be decided by this Court if either of the points raised by petitioner is determined in his favor. In our view, the government's point presents serious factual questions, and its resolution will involve the "burdens of canvassing and assessing'" (Govt. Br. 43) the trial record. Since the issue has been raised, however, we will undertake such a "canvassing and assessing." On the merits the issue should be decided in favor of petitioner, whether the decision is made by this Court or is left to the Court of Appeals in the normal fashion.[1]

I. The Evidence Fails to Establish That Petitioner Misrepresented Communist Belief and Membership.

It is essential to the government's contention that the evidence, when tested by the stringent denaturalization standard, demonstrate that petitioner untruthfully answered two questions asked of him by naturalization examiner Derrenger. Derrenger had no independent recollection of his interview of petitioner, but testified concerning his practice in pre-naturalization interviews.[2] Derrenger testified that "I would ask the petitioner [for naturalization] whether he believed in Nazism, Communism or Fascism." If the applicant

[1] The two cases cited by the government as exceptions to the normal remand practice (Br. 42) do not seem relevant. In both, the Court emphasized that the limited scope of judicial review of the factual findings, there made by administrative agencies, made it pointless to remand on the particular records. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 508; *United Gas Co.* v. *Memphis Gas Div.*, 358 U. S. 103, 114. In a denaturalization case, in contrast, appellate review of the facts is required to be comprehensive. *Knauer* v. *United States*, 328 U. S. 654, 657; *Stacher* v. *United States*, 258 F. 2d 112, 120 (9th Cir. 1958).

[2] See Govt. Br. 6, ftn. 6.

answered in the affirmative, Derrenger would note "NAC" on the application, meaning "not attached to the Constitution." (R. 28.) In fact, Derrenger noted on petitioner's application "AC" (R. 73; 5 Tr. 14).

Derrenger also testified that it was his practice to ask an applicant "what organizations he belonged to," to note the applicant's answer on the form, and to make sure that the applicant had answered the question fully (R. 30). He noted on petitioner's application: "Organization—Fraternal Benefit Society of Internation [sic] Workers Order, where applicant is employed—no others" (R. 73). This meant, he testified, that the present petitioner told him he belonged to the International Workers Order where he was employed, and to no other organizations (R. 30).

The circumstances that Derrenger testified as to his practice and not as to the particular interview, and that the questions were not required by statute or regulation, raise a serious question whether his testimony established by the requisite degree of proof the essential facts of what petitioner was asked and what he answered. *Cufari* v. *United States*, 217 F. 2d 404 (1st Cir. 1954). But assuming that the questions and answers were those indicated by Derrenger's testimony nevertheless the evidence fails to establish that the answers were false.

The questions, being couched in the present tense, related to petitioner's belief in Communism and organizational membership on the date of the interview, June 27, 1940 (R. 73; Govt. Br. 5). The evidence fails to establish that on or near that date petitioner believed in Communism or belonged to the Communist Party (or to any organizations other than the IWO).

Hence the evidence does not unequivocally establish that the answers were false, and the foundation of the government's contention disappears.

The government's evidence showed that in the early 1930's, petitioner was an open, publicly-avowed district organizer of the Communist Party. But this evidence goes no further than 1936, being carried so far by testimony of Lautner that in 1936 or 1938 petitioner attended a national convention of the Party as the head of a Missouri delegation.[3] The only evidence indicating that petitioner belonged to the Communist Party at a subsequent date was Lautner's testimony that in the winter of 1945-46, petitioner attended a Party meeting as district representative of the Party's Ohio District.[4]

Furthermore, Lautner testified that from 1939 to 1942 petitioner was a full-time employee of the IWO

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[3] Lautner originally testified that the convention was held in 1938 (R. 44-45). He later testified that it was held in 1936 or 1938, he did not recall which (7 Tr. 383, 455). In view of the heavy burden of proof on the government, we believe we are entitled to assume the alternative more favorable to the petitioner, namely, 1936.

[4] These facts appear from the government's own summary of the evidence (Br. 10-14) subject to the correction of one inaccuracy. The government's brief (p. 13) states that after the convention of 1936 or 1938 "Lautner continued thereafter to meet petitioner from time to time at Party National Conventions and National Committee meetings (R. 44)." Examination of the record at the cited page will show that Lautner was testifying not about Party meetings after the 1936 or 1938 convention, but about meetings after the conclusion of a school which had been held in 1931 (R. 40-41). Furthermore, Lautner himself subsequently testified that he was not sure that he had met petitioner at any Party conventions other than that held in 1936 or 1938 (7 Tr. 447), and it also became apparent that he had been merely assuming, not recalling, that he had seen petitioner at national committee meetings (7 Tr. 443-45).

(R. 50-51), and as we have already seen, petitioner told Derrenger that he was so employed on June 27, 1940 (R. 73). This employment is clearly inconsistent with petitioner's having been a district organizer for the Party during its tenure (see 7 Tr. 390).

The evidence therefore shows petitioner's Party officership preceding the critical date by four years and Party leadership following the critical date by five and a half years. There is no evidence of Party membership or leadership between the two extremes. This fact in itself prevents a finding of Communist Party membership or Communist belief at a date about in the middle of the period, particularly one which must be supported "by clear, unequivocal and convincing evidence which does not leave the issue in doubt" (Pet. Br. 11). Furthermore, as we have seen, it is clear that petitioner's Party status did change at some time after the 1936 convention since he could not have been a Party district organizer after he went to work for the IWO in 1939. Finally, in view of the government's close surveillance of the Communist Party and the extent of the dossier it compiled on petitioner, the absence of evidence for a period of more than nine years makes it more reasonable to surmise that petitioner was not a Party member in June 1940, than to speculate the contrary.

In an effort to plug the gap in the evidence, the government emphasizes (Br. 13) that the IWO, which employed petitioner from 1939 to 1942, was controlled by the Communist Party, according to the testimony of Lautner, a professional anti-Communist witness and "consultant" (7 Tr. 463-69). But petitioner did not conceal from the naturalization examiner his connection with the IWO; on the contrary, Derrenger

noted on petitioner's application that petitioner belonged to and worked for the IWO. There is, therefore, no basis for the government's insinuation that petitioner's disclosed connection with the IWO is evidence that petitioner suppressed membership in the Communist Party during the same period.

II. The Evidence Does Not Support the Finding of Misrepresentation of Attachment and Allegiance.

The district court found (R. 85) that in the naturalization proceeding the petitioner falsely represented attachment to the principles of the Constitution and allegiance to the United States. So far as we can perceive the government makes no attempt to justify this finding and suggests no evidentiary basis for it. Instead, it ignores the finding altogether.[5] The fact is that there is nothing in the record to support the finding. The district court made the finding solely on the basis of its supposition, itself unsupported, that petitioner was at the time of naturalization a member of the Party. Even if the supposition had been warranted, it did not furnish an adequate basis for the finding of nonattachment and lack of allegiance. *Schneiderman* v. *United States*, 320 U. S. 118; *Nowak* v. *United States*, 356 U. S. 660; *Maisenberg* v. *United States*, 356 U. S. 670.

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[5] Thus the government recognizes (Br. 41) only "two bases" for the denaturalization judgment, "concealment and misrepresentation in relation to petitioner's record of arrests; concealment and misrepresentation in relation to petitioner's Communist Party membership."

III. Even if Misrepresentation of Communist Party Membership Had Been Proved, the Misrepresentation Was Immaterial and Hence Not a Cause for Denaturalization.

Petitioner was naturalized under the 1906 Act (Pet. Br. 16, ftn. 5). That Act did not forbid the naturalization of members of the Communist Party (cf. *Schneiderman* v. *United States, supra*), or, for that matter, of members of organizations advocating violent overthrow of the government.[6]

Thus a misrepresentation of Communist Party membership did not satisfy the first test of materiality for denaturalization purposes, since it did not suppress a fact which in itself would have rendered an applicant ineligible for citizenship. (See Pet. Br. 11-15.) The government does not claim the contrary, but bases its claim of materiality on the proposition that disclosed Party membership "might" have led the naturalization court to "conclude that an applicant for citizenship was lacking in attachment to the principles of the Constitution" (Br. 46).

Such attachment was, of course, a requisite under the 1906 Act. And, in accordance with our second test of materiality (Pet. Br. 11), denaturalization would be justifiable for misrepresentation of a fact which, though not itself disqualifying, would have led to the discovery of other facts which were disqualifying. But it is clear that this is not the situation here. The government's complaint in the denaturalization proceeding alleged that petitioner had misrepresented attachment

[6] The government's brief in No. 25 of this term, *Polites* v. *United States*, at pp. 38-42, examining the legislative history of the Nationality Act of 1940, shows that the Act was intended to *change* the 1906 Act so as for the first time to withhold naturalization from members of organizations advocating violent overthrow, including, by Congressional assumption, members of the Communist Party.

and allegiance (R. 19). Yet, as we have seen, it utterly failed to prove non-attachment or lack of allegiance. Hence it failed to carry its burden of proving that the alleged misrepresentation foreclosed discovery of either of these disqualifying factors.[7]

Respectfully submitted,

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[7] The government also suggests (Br. 39-40) that if petitioner had disclosed his arrest record, "it would appear likely" that an ensuing investigation would have discovered his Communist Party connection and might thus have caused denial of naturalization for lack of attachment. The speculation as to what an investigation might have disclosed is contrary to the government's own testimony (Pet. Br. 17-18), and in any event does not satisfy the evidentiary burden in denaturalization cases. But even if there were evidentiary basis for the surmise, nevertheless, for the reasons explained in the text, the Communist Party connection was not shown to be grounds for a finding of non-attachment.